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In The

Supreme Court of the United States

October Term, 1968

No. 1166

RONALD GERHARD (as Claimant of 440 U. S. Gold Coins and One 1961 Chevrolet Automobile),

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on December 17, 1968.

Citations to Opinions Below

The opinion of the District Court is unreported and, in pertinent part, is printed at Appendix B hereto. The Court of Appeals delivered no opinion, merely affirming the District Court from the Bench at the conclusion of oral argument.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 17, 1968, Appendix B, infra.

Questions Presented

1. Can 12 U.S.C. § 95A (the Executive Order gold embargo) alone support a forefeiture action for smuggling U.S. gold coins, or is the government limited to seeking only a penal sanction pursuant thereto?

2. Do 12 U.S.C. § 95A (the Executive Order gold embargo) and 31 U.S.C. § 442 (The Gold Reserve Act), insofar as they prohibit Americans from owning gold, violate the Ninth Amendment to the Constitution of the United States?

Constitutional Provision and Statutes Involved

Involved in this case are the Ninth Amendment to the Constitution and 12 U.S.C. § 95A (the Executive Order gold embargo) and 31 U.S.C. § 442 (the Gold Reserve Act). They are set forth, in pertinent part, at Appendix A, infra.

Statement

Petitioner smuggled 440 U.S. Gold Coins into the United States from Canada in a 1961 Chevrolet automobile. The government commenced a libel proceeding against the coins and the automobile pursuant to the Gold Embargo and the Gold Reserve Act, and petitioner interposed a claim therefor.

Despite petitioner's contentions that the Gold Embargo was only a penal statute and that therefore no forefeiture could be sought under it alone, and that it and the Gold Reserve Act violated the Ninth Amendment's guaranty of a citizen's unenumerated right to own gold, the District Court granted the government the forfeiture that it sought.

The Second Circuit, at the conclusion of oral argument and from the Bench affirmed the District Court without opinion.

Reasons for Granting the Writ

The writ should be granted with regard to the first question presented because the Second Circuit has apparently perpetuated a serious error of federal law committed by the District Court, to wit: holding that under 12 U.S.C. § 95A, which is manifestly and exclusively a penal statute, a civil forfeiture can be had. This is especially erroneous in view of the fact that the forfeiture section of the Gold Reserve Act (31 U.S.C. § 443) specifically enumerates the various other sections of federal law for violation of which it may be availed to accomplish a forfeiture, and 12 U.S.C. § 95A is not one of those enumerated. The im-

portance of this enormous enlargement of federal power, particularly in the face of absolutely no statutory authorization therefor, is a matter of universal national importance.

Even more compelling reasons exist for granting the writ with regard to the second question presented.

The "money power" of Congress, specifically delegated to it by Article I, Section 8, Clauses 2 and 5, is limited to the power "To borrow money on the credit of the United States ... To coin money, regulate the value thereof, and of foreign coin..."

Although under the above this Court has held that Congress has the power to declare what is to be legal tender, establish a national currency either in coin or in paper, vary the amount of gold contained in the dollar and create a national bank, it has never held that our government has the power to make Americans into criminals for owning gold, nor that their gold can be confiscated.

Nor is there a power specifically delegated to Congress to that effect.

On this basis alone, the Petition herein should be granted.

Yet, there is another reason for granting the writ here, one even more compelling than the foregoing.

Not only has this Court never ruled on the

proscription of gold ownership — an issue of obvious crucial importance to every American today, in view of the world's current paper money debacle — but the Court has also never utilized exclusively as the tool of striking down unconstitutional legislation, the Ninth Amendment, which issue this case presents.

In Griswold v. Connecticut, 384 U.S. 479, this Court acknowledged that the Ninth Amendment does have meaning, that it is a recognition of the existence of unenumerated Constitutional rights, one being the right of married couples to use contraceptives.

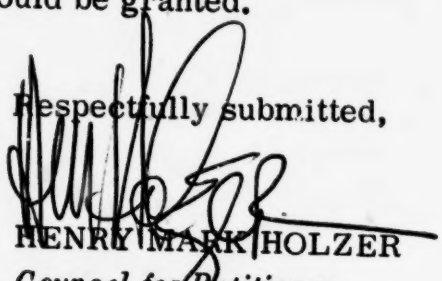
Thus, this case presents a doubly novel, and exceedingly crucial issue: Does the delegated money power constitutionally authorize and embrace the Gold Embargo's and Gold Reserve Act's prohibition on owning and/or possessing gold — particularly in view of the Ninth Amendment's reservation of all unenumerated rights to the people?

The answer to this question goes not only to the heart of the relation of the State and economics, but it also profoundly affects the meaning of the Ninth Amendment and the entire concept of unenumerated rights. In today's context of concern with individual rights on the one hand, and vast fiscal and monetary upheaval on the other, the instant case is one of great importance.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



HENRY MARK HOLZER
Counsel for Petitioner

March 10, 1969.

Appendix A

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Gold Embargo (12 U.S.C. § 95A):

> "...no person shall hold...any gold coin, gold bullion or gold certificates...except under license..."

Gold Reserve Act (31 U.S.C. § 442):

> 'The Secretary of the Treasury shall... prescribe the conditions under which gold may be acquired and held..."

Appendix B

Opinion, in pertinent part, of District Court:

> "...I see no merit in the defense contention that the Gold Embargo Act [sic] and the regulations promulgated pursuant thereto are violative of the Constitution of the United States..."

Judgment of Circuit Court:

* * *

> "ON CONSIDERATION WHEREOF, IT IS now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed ..."

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1166

RONALD GERHARD (AS CLAIMANT OF 440 U.S. GOLD COINS AND ONE 1961 CHEVROLET AUTOMOBILE), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1968. The petition for a writ of certiorari was filed on March 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether Congress had the power to enact laws which provided for the forfeiture of gold coins smuggled into the United States from Canada.

STATUTES AND REGULATIONS INVOLVED

31 U.S.C. 442 provides:

> The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States.

31 U.S.C. 443 provides:

> Any gold withheld, acquired, transported, melted or treated, imported, exported, or ear-

> marked or held in custody, in violation of sections 315b, 405b, 408a, 408b, 440-446, 733, 734, 752, 753, 754a, 754b, 767, 771, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417, and 467 of Title 12 or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of said sections or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

31 C.F.R. 54.20 provides in pertinent part:

> (a) Gold coin of recognized special value to collectors of rare and unusual coin may be acquired, held, and transported within the United States without the necessity of holding a license therefor. Such coin may be imported, however, only as authorized by this section or §§ 54.28 to 54.30, 54.34, 54.40, or licenses issued thereunder, and exported only in accordance with the provisions of § 54.25.
>
> (b) Gold coin made prior to April 5, 1933, is considered to be of recognized special value to collectors of rare and unusual coin.

STATEMENT

On the evening of February 26, 1965, petitioner was arrested by customs agents after he crossed the Canadian border near Cherubusco, New York, in an automobile. A search of the car uncovered 440 gold United

States coins [1] secreted in a seat and in the arm rests. Thereafter, petitioner was charged in the United States District Court for the Northern District of New York with introducing the coins into the United States by means of false statements (Count 1) and smuggling (Count 2), in violation of 18 U.S.C. 542 and 545. On December 17, 1966, he pleaded guilty to count 1, and thereafter was sentenced to probation for three years and fined $1,000.[2]

Following the conviction, the government instituted proceedings in the Northern District of New York to forfeit the gold coins and petitioner's automobile. The libel of forfeiture alleged that the attempt by petitioner to introduce the gold coins in interstate commerce was contrary to 31 U.S.C. 442 and 31 C.F.R. 54.20, as well as 18 U.S.C. 542, 18 U.S.C. 545, and 12 U.S.C. 95a and that, accordingly, the coins and petitioner's automobile became subject to forfeiture under 31 U.S.C. 443 and 19 U.S.C. 1460. Following a hearing, the district court ordered the forfeiture (R. 137-147) and the court of appeals affirmed.

ARGUMENT

Petitioner argues that there is no provision in the Constitution for the federal government to control gold, and that the right of the people to own such a

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[1] The coins were of the following denominations: 320 $20 liberty head coins, minted between 1900 and 1907, 10 $10 Indian head coins, dated 1907-1913, and 110 $5 liberty head coins, dated 1857-1907 (R. 98, 102 and accompanying papers).

[2] Count 2 was dismissed on the government's motion.

commodity is guaranteed by the Ninth Amendment. The Constitution, however, vests in the Congress powers to lay and collect taxes, coin money and regulate its value, fix the standards of weights and measures, regulate commerce, and to make all laws which are necessary and proper to carry out these powers. In 1934, Congress passed the Gold Reserve Act, 31 U.S.C. 440, and other laws designed to provide a sound monetary system. H. Rep. No. 292, S. Rep. No. 201, 73rd Cong., 2d Sess., accompanying H.R. 6976. The Congressional power to regulate the holding of gold has repeatedly been upheld. See *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 295-297; *Hunsaker* v. *United States*, 279 F. 2d 111 (C.A. 9); *Laycock* v. *Kenney*, 270 F. 2d 580 (C.A. 9), certiorari denied, 361 U.S. 933; *Farber* v. *United States*, 114 F. 2d 5 (C.A. 9), certiorari denied, 311 U.S. 706.

One of the provisions of the Gold Reserve Act, 31 U.S.C. 442, empowered the Secretary of the Treasury to prescribe the conditions under which gold could be imported. Pursuant to this authority, the Secretary promulgated a rule requiring a license to import gold coin. 31 C.F.R. 54.20. The Gold Reserve Act provides for the forfeiture of gold transported, acquired, or imported in violation of the law. 31 U.S.C. 443. In this case it is undisputed that petitioner had no license to import gold coins from Canada (R. 147). The coins were therefore properly subject to forfeiture.

Moreover, Congress has the constitutional power to control importation of any goods from a foreign country. *Buttfield* v. *Stranahan*, 192 U.S. 470, 492-493.

One section of the Tariff Act of 1930, 19 U.S.C. 1460, provides in pertinent part:

> * * * If any merchandise is imported or brought into the United States in any vessel or vehicle * * * from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers * * * such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture * * *.

In addition, under 18 U.S. 545 merchandise smuggled into this country is to be forfeited to the United States. Thus petitioner's gold coins and automobile were properly ordered forfeited when the evidence at the hearing showed that petitioner had smuggled the coins into the United States from Canada without reporting them to customs officers. See *United States* v. *Kushner*, 135 F. 2d 668 (C.A. 2), certiorari denied, 320 U.S. 212; *Lozano* v. *United States*, 17 F. 2d 7 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1969.

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